United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF FOR REHEARING EN BANC

74-1793

IN THE

United States Court of Appeals
FOR THE SECOND CIRCUIT

B
P/S

RACHEL EVANS, STEVEN R. KIDD, FERNELL PATTERSON and WALTER B. BROOKS, JR., on behalf of themselves and all others similarly situated,

Plaintiffs-Appellants,

against

JAMES T. LYNN, Secretary, Department of Housing and Urban Development, *et al.*,

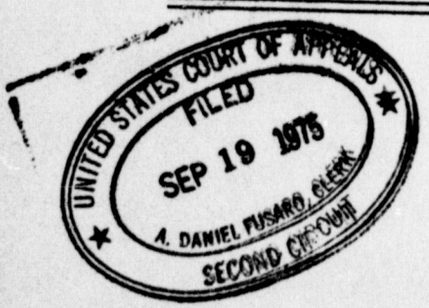
Defendants-Appellees,

and

TOWN OF NEW CASTLE,

Defendant-Intervenor-Appellee.

BRIEF FOR APPELLANTS ON REHEARING EN BANC AND APPENDIX



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1. Whether the appellants have suffered injury in fact by appellees' failure to enforce Federal Civil Rights Statutes and thereby have standing to sue.

2. Whether the appellants come within the zone of interests protected by the Federal Fair Housing Act and the Civil Rights Act of 1964.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 74-1793

RACHEL EVANS, et al.,

Appellants,

-v-

JAMES T. LYNN, et al.,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANTS ON REHEARING EN BANC

STATEMENT OF THE CASE

This matter comes before this Court for rehearing en banc of an appeal determined by a panel composed of Judges Moore, Oakes and Gurfein. A majority of the panel determined that the low-income minority appellants had standing to challenge the appellees' failure to comply with

federal civil rights statutes and regulations in making community development grants-in-aid to the Town of New Castle, New York.

The appellants are four black citizens who live in racial ghettos in Westchester County, New York. They brought suit against the federal departments of Housing and Urban Development (HUD) and Interior asserting that the two agencies had violated the affirmative action requirements of Title VIII of Civil Rights Act of 1968 (the Fair Housing Law) and Title VI of the Civil Rights Act of 1964 when they approved grants to the virtually all-white Town of New Castle in Westchester County. The appellants contended that before approving these grants the agencies were required to evaluate the economic and racial consequences of that Town's housing and development practices. The appellants further contended that approval of these grants in the face of New Castle's discriminatory land use policies has the effect of maintaining racial residential segregation in Westchester County and constrains them to continued residence in the County's ghettos.

The complaint was filed in the United States District Court for the Southern District of New York in August, 1973 (1a-16a).*

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* The complaint contained allegations as to failures by the Tri-State Regional Planning Commission with respect to the grants to New Castle. On appeal the original panel upheld the district court's dismissal of the complaint as to that defendant. That determination is not on review at this time. Order of this Court granting petition for reconsideration en banc, August 11, 1975.

Subsequently, the federal appellees moved to dismiss the complaint on several grounds, including lack of standing (17a) and appellants moved for a preliminary injunction restraining HUD and Interior from distributing any moneys to New Castle pursuant to the contested grants (19a).

The district court heard these motions on October 19, 1973. At that time the court reserved decision on both motions pending the creation of a factual record on the civil rights enforcement procedures that were undertaken by HUD and Interior with respect to the challenged grants. The Court directed the United States Attorney to make available the relevant administrative files and required that depositions be taken of the officials involved in the approval of the grants (98a-99a).

On March 9, 1974 the Town of New Castle and the King-Greeley Sewer District, the formal recipient of the HUD grant, moved to intervene in this action. Although the court reserved decision on that application, it granted the Town and Sewer District permission to participate in the proceedings. On April 15, 1974 the Town and Sewer District formally joined in the federal appellees' motion to dismiss for lack of standing (43a). The district court in its final order approved the intervention (97a). On May 22, 1974 the district court dismissed the complaint on the grounds that the appellants lacked standing to sue (90a). The district court opinion appears at 376 F. Supp. 327.

On June 2, 1975 this Court reversed in an opinion written by Judge Oakes and concurred in by Judge Gurfein. Judge Moore dissented. On August 11, 1975, this Court granted the petitions for rehearing filed by the federal government and New Castle.

STATEMENT OF THE FACTS

Westchester is a county of extreme contrasts. On one hand, the County contains some of the wealthiest communities in the nation; for the most part, these communities are located in the northern part of the County. In contrast, there are a series of poorer, older areas in the County in which the majority of Westchester's minority families, including the appellants, live; for the most part, these areas are in the southern and western parts of the County. Challenged are federal grants to the Town of New Castle, a community which epitomized the white, affluent portions of the County and a Town which has fought construction of housing which would be available to appellants. It is within this context that the appellants contested the failure of the federal agencies to adhere to the applicable civil rights statutes designed to eliminate racial segregation.

Westchester's Minority Population

The appellants reside in the Westchester communities of Yonkers, Peekskill, White Plains and Ossining (2a-4a). According to the 1970 census, these communities, along with Mount Vernon and New Rochelle, account for almost 75 percent of the total non-white population of the County. The appellants brought this case as a class action on behalf of low and moderate income, minority residents of Westchester who, like themselves, are constrained to reside in racially concentrated neighborhoods in the County.*

Overall, non-whites comprise approximately 10 percent of Westchester's population. 376 F. Supp. at 330 (95a-96a). The residential confinement of the minority population is dramatically illustrated by the fact that while Westchester's total non-white population increased by 28,897 persons from 1960 to 1970, 21,000 of these minority persons, or 72 percent, moved into the older communities of Mount Vernon, New Rochelle, White Plains and Yonkers. These communities already housed 63.4 percent of the County's non-white population as of the 1960 census (25a).

* Appellants' motion to certify the class was not resolved below because of the district court's ultimate disposition of the case. 376 F. Supp. at 334, n. 9.

All of the appellants have low or moderate incomes and are all confronted with housing problems that have been exacerbated by discrimination and segregation (3a-4a, 87a-89a). For example, appellant Fernell Patterson, in an affidavit filed in support of his claim to standing, stated that he has "resided in Westchester County since 1960 and during that time, I have always been constrained to reside in racially concentrated areas." Patterson's neighborhoods have all been "characterized by dilapidated housing and inadequate levels of municipal services" (87a-88a).

Appellant Brooks resides in a severely dilapidated apartment in Ossining (4a). Appellant Evans was forced to relocate from two different dwellings in Peekskill as a result of urban renewal demolitions (2a) and now resides in public housing in that community (Evans deposition, pp. 14-15). Appellant Kidd resides in a dwelling with serious plumbing and structural defects (3a). The district court concluded that the appellants' allegations of ghetto living conditions "are a very real and serious injury." 376 F. Supp. at 332 (102a).

The Town of New Castle

The Town of New Castle is a "predominantly white and a well-to-do enclave" located in northern Westchester County with a minority population of only 1.3 percent. 376 F. Supp. at 330. Only

2 percent of New Castle's population increase from 1960 to 1970 was non-white (25a).

The median family income in New Castle in 1970 was $22,005 as compared with $11,349 in Westchester as a whole. 376 F. Supp. at 330. The median income for Black families in Westchester was $8,639, and for Spanish-speaking families, $7,889 (28a).

New Castle has a land area of about 25 square miles (45a). Approximately 7000 acres of land in the Town are vacant and suitable for development (28a-29a). However, almost 90 percent of the Town is restricted by the local zoning ordinance to the development of single-family houses on parcels of at least one acre. Two-family houses, garden apartments and all other forms of multi-family housing are prohibited (26a-27a). As a result, those forms of housing which are available for lower-income families are excluded and only the most expensive form of housing may be built (26a). This is attested to by the fact that the median value of single-family houses in New Castle in 1970 was in excess of $50,000. 376 F. Supp. at 330.

The district court found in its opinion, "New Castle continues to be resistant to attempts to alter its present housing character." 376 F. Supp. at 330. The court noted that New Castle

had "successfully thwarted" the attempt of the New York State Urban Development Corporation to "construct a small 100-unit, low-cost housing facility in the Town." Ibid. The record also shows that the Town's master plan sets as a goal "maintaining New Castle as a single-family residential community," and specifically provides with reference to the development of sanitary sewers, that "the provision or extension of water and sewers in low [density] residential areas shall not ... be considered as a basis for rezoning to higher residential density." (29a).

In 1969 New Castle, through the King-Greeley Sewer District (which was organized by the Town pursuant to New York Town Law), requested federal aid from HUD under the Federal Water and Sewer Facilities Grant Program (42 U.S.C. 3102) for the construction of a sanitary sewer facility in the Hamlet of Chappaqua in New Castle. Similarly, in 1972 the Town submitted an application to the Department of Interior's Bureau of Outdoor Recreation (BOR) for federal funds to aid in the acquisition and development of a public park and outdoor recreation area. The application was made pursuant to the Land and Water Conservation Fund Act. 16 U.S.C. 460 L (8). Both grants were approved.

The HUD Grant

HUD procedures require that a "rating sheet" be completed when a grant application like that submitted by New Castle is received in its offices (See 24 CFR Pt. 556). William S. Green, the regional administrator of HUD, stated at his deposition that HUD had no basis for passing on applications other than the rating system (115a). Robert Mendoza, the HUD official who prepared the rating sheet for the New Castle grant, testified that he never reviewed the housing and land-use policies of an applicant community prior to rating a sewer application (194aa-194ca). Green stated that in his view the absence of low and moderate income housing in a community is not a bar to the grant of a sewer application. He further testified that even overt practices of housing discrimination are not taken into consideration in reviewing sewer applications except insofar as they may be reflected in HUD's preliminary rating sheet system (115a).

The application review in this case was described by Mendoza. In March 1972 he visited the Town of New Castle in the company of the program director of the New York Area office of HUD (183a-184a). They performed an on-site inspection of the proposed project area and consulted with New Castle public officials. This inspection consisted of a drive through the project area and an hour-and-a-half meeting with local officials (183a-184a). Mendoza stated

that one or two days later he completed a HUD rating sheet on the application, except for the financial rating which was completed by a financial officer in the area office.

After HUD announced the grant in early 1973, a civil rights organization located in Westchester County wrote a letter of complaint to HUD detailing New Castle's discriminatory land-use and community development policies and asking HUD to reconsider approval of the sewer grant (30a). This complaint stimulated an inquiry from HUD's regional office to its area office about the grant and led to the discovery that there was no rating sheet for the project in the administrative file (139a). As a result, someone in the regional office directed the area office to "reconstruct" the rating sheet (140a). In February 1973, Mendoza was summoned from the Boston office, where he had been transferred. He returned to New York to produce a new rating on the basis of his recollection (185a-186a).

The reconstructed rating sheet was dated and signed in a manner which made it appear to have been prepared the previous year, contemporaneously with the application review (144a, 147a). When this document was submitted to the district court as part of the administrative file on the HUD grant, no explanation of the manner of its preparation was provided. Subsequently, the

United States Attorney informed the court and counsel for appellants that the document was a "reconstruction" (220a-221a).*

One result of the complaint to HUD was a de novo rating of the application by a regional official responsible for monitoring community development grant applications. That rating indicated that the New Castle application should have received no more than about 30 points (176a), instead of the 41 point total that appears in the reconstructed sheet (189a-190a). Had the application received only 30 points, the grant would never have been awarded to New Castle (177a).**

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* The Regional Administrator testified that he approved the "reconstruction and simply expressed to his staff his unhappiness with their sloppiness. (123a-124a).

** The regional official corrected the number of points awarded New Castle for financial need, stating that the Town should have received no points in this category because of its extreme wealth and its ability to finance its own sewer system (175a, see "reconstructed" rating sheet, 222a). The program manager of the area office testified that it was the practice of the New York office not to invite full applications for projects receiving less than 40 points. The regional official concurred in this view, stating that 41 points was the lowest rating of a sewer application ever approved in the New York area and that a project with a 30 point rating would not normally be funded (177a).

The BOR Grant

The BOR grant arose out of a 1972 decision by New Castle to acquire and develop approximately 33 acres of land known as Turner Swamp for the purpose of creating a public park and outdoor recreation area. Under the outdoor recreation program, a state liaison officer reviews and rates grant applications (205a-206a).

BOR's grant review involves absolutely no civil rights enforcement procedures. The BOR official who received the New Castle application from the state testified that he did not make any effort to determine the nature of New Castle's housing and community-development practices, and that he was unaware of any BOR policy with respect to the Title VIII obligation to promote fair housing opportunity in connection with the outdoor recreation program. The only indication of civil rights involvement was that a standard Title VI compliance form was attached to the application and signed by the Town Supervisor (202a-204a, 207a).

Federal Civil Rights Enforcement Policies

The affidavit of Howard A. Glickstein (31a-38a), former staff director of the United States Commission on Civil Rights, catalogues the failure of federal civil rights enforcement in community development

programs on a national level. Glickstein states that the Civil Rights Commission undertook a review of the federal civil rights enforcement effort which culminated in the publication of several reports on the matter (32a).

The first report was issued in October, 1970 and is entitled "Federal Civil Rights Enforcement Effort." (32a). In that report, the Civil Rights Commission focused on the extent to which HUD and other federal agencies had administered their community development programs affirmatively to achieve fair housing opportunities. The Commission viewed implementation of this section as the key determinant of the success of the Fair Housing Law (22a-34a). The Commission concluded, however, that HUD "had devoted itself to processing individual complaints of housing discrimination to the exclusion of all other responsibilities under the Act."

A Reassessment Report issued in 1972 indicates that HUD is still failing to seek enforcement of the affirmative obligation section of the Fair Housing Act (35a). It concluded that HUD carried out no compliance reviews whatsoever of community development programs in communities alleged to have discriminatory housing and land-use practices (35a). Moreover, the Report concluded that the HUD water and sewer program is the only HUD community

development program which has no requirement that steps be taken to expand low and moderate income housing opportunity within an applicant community (35a). The Report also noted that HUD's performance contrasted with that of the Environmental Protection Agency because that agency has "begun to inquire into the exclusionary impact of a community's land-use laws before approving funds for its own Waste Treatment Construction Program" (35a-36a).

In the 1970 Report, the Commission criticized the Department of Interior's entire administrative civil rights enforcement structure and found that in the BOR program, the civil rights compliance investigators relied on the state liaison office to fill out the review report (36a). Glickstein further states that the Department of Interior has completely failed to promulgate regulations which would seek to insure non-discriminatory access to recreation areas and to encourage fair housing opportunity in applicant communities (37a).

THE OPINION OF THE PANEL

The majority of the panel which heard this appeal held that the appellants had standing to challenge the alleged lack of compliance by the appellee agencies with the provisions of Title VIII and Title VI. Judge Oakes, writing for the Court, stated that in determining

this issue three basic facts had to be assumed: (1) the appellants are low-income minority residents of Westchester County confronted with residential segregation and problems of housing inadequacies, (2) New Castle is an affluent, predominantly white enclave which has resisted all efforts to include lower cost units in its housing stock, and (3) HUD and BOR "did very little by way of evaluating the Town's development policies or otherwise to perform allegedly affirmative duties required of them by Title VI and Title VIII respectively...." Slip. Op. 3889-3891.

Assuming these underlying facts, the Court analyzed the language of the statutes involved, the legislative histories and the case law, and concluded "that the first of the two prongs of the test of standing is met; appellants are arguably within the zone of interests protected by Titles VI and VIII." Slip Op. 3896. The Court held that the appellants' claims under Title VIII may be the stronger because of the limitation in Title VI providing that in the event of a violation of any non-discrimination requirement in the Act, the federal agency is limited to terminating funding only to the particular program affected. 42 U.S.C. 2000d-1. The Court stated, however, that resolution of that issue was to be on the merits. As to Title VIII, the panel found the law precise and clearly applicable to the challenged grants.

> Here the "statutory right" is to have programs and activities "relating to housing and urban development" administered in furtherance of the fair housing policy. That right is invaded by grants for sewer facilities or acquisition of recreation areas in urban communities which are not so administered.
>
> Slip Op. 3896

The appellants were within the zone of interests protected by both VI and VIII as:

> The inaction on the part of the federal agencies here may have created a breach of their affirmative duties under these Acts and these Acts were designed to protect people such as these appellants who continue to live in ghettoized communities in the New York City metropolitan area. Title VI protects every person in the United States from discrimination in applicable projects, and Title VIII seeks to ensure fair housing throughout the United States.
>
> Slip Op. 3896-3897.

Judge Oakes then went on to find that the appellants also satisfied the second requirement of standing that there is alleged an "injury in fact" to them as a result of the administrative failures. In determining this issue, the Court pointed out that it would be improper to look solely to New Castle's housing and land-use policies. Rather, the thrust of the appellants' claims relates to "the failure of HUD and BOR to implement Title VIII, the fair housing law, an act which was intended to change the functions of federal grant programs the history

of which ... reinforced existing, if not created new, patterns of racial segregation." Slip Op. 3897-3898. Funding of New Castle's programs without compliance with Titles VIII and VI the Court held, "contribute to the perpetuation of appellants' living patterns in the New York metropolitan area." Slip Op. 3898. The nexus between the agency failure and the alleged injury was plain:

> Here, then, are agencies with an affirmative duty to encourage fair housing. Allocation of grants without assessing their impact on integration not only may maintain the status quo of living patterns, resulting in injury to those who must continue to live in ghettos, but may also increase the disparity between living styles by supporting "white enclaves" while diverting funds which otherwise would have been used to alleviate ghettoization.
>
> Slip Op. 3898.

Judge Gurfein concurred with Judge Oakes that the appellants had established standing to contest the HUD and BOR grants. Slip Op. 3917. Judge Gurfein stressed that he found the

> [P]laintiffs are "adversely affected or aggrieved by agency action within the meaning of a relevant statute" under the Administrative Procedure Act, Section 5, U.S.C. §702, to raise the question of whether the Secretary has failed to make the inquiries implied from his affirmative duty "to administer the programs and activities relating to housing and urban development in a manner affirmatively to further the policies of this subchapter.'"
>
> Slip. Op. 3917-3918.

Judge Gurfein cautioned that he was not implying by his ruling that the appellants necessarily would be entitled to injunctive relief; nevertheless, in light of the national policy to eliminate racial discrimination, the appellants were entitled to test whether the appellees had met their statutory duties. Judge Gurfein agreed that an adequate showing of injury in fact had been made and emphasized that the Court should be more liberal in "granting standing where the challenge is to alleged administrative failure to act in the face of an alleged statutory duty, particularly in a civil rights case." Slip Op. 3919.

Judge Moore in his dissent argued that the majority opinion ran contrary to several recent Supreme Court decisions. United States v. Richardson, 418 U.S. 166 (1974); Schlesinger v. Reservists to Stop the War, 418 U.S. 208 (1974); O'Shea v. Littleton, 414 U.S. 488 (1974). Slip Op. 3910-3913. According to the majority, these cases entailed constitutional challenges to federal statutes, which it held did not apply to cases involving challenges to administrative inaction and brought under the Administrative Procedure Act. Slip Op. 3898-3899; 3917-3918.

A copy of the panel's decision is appended to this brief.

I

THE APPELLANTS HAVE SUFFERED INJURY IN FACT BY APPELLEES' FAILURE TO ENFORCE FEDERAL CIVIL RIGHTS STATUTES AND THEREBY HAVE STANDING TO SUE

The appellants' complaint in this matter flows exclusively from the failure of two federal administrative agencies, HUD and BOR, to implement statutory civil rights requirements in approving community development grants. The relief sought is directed only as against these agencies. The plaintiffs charge that HUD and BOR failed to meet the statutory requirements of Titles VIII and VI to act affirmatively to promote equal housing opportunities and to end discrimination in federal programs.

The Fair Housing Act, in addition to the sections proscribing discrimination in sales, rentals and the provision of housing opportunities,* directs that all federal executive departments and agencies, and specifically the Secretary of HUD, "administer their programs and activities relating to housing and urban development in a manner affirmatively to further the purposes of this subchapter...." 42 U.S.C. 3608 (c) and (d)(5). Further, all executive departments

* See, e.g., 42 U.S.C. 3604. Sections 42 U.S.C. 3610 and 3612 establish broad administrative and judicial relief for such discrimination.

and agencies are instructed to cooperate with HUD in affirmatively furthering fair housing. 42 U.S.C. 3608(c). This requirement is to be read in conjunction with the introductory language to Title VIII setting forth the legislative purpose: "It is the policy of the United States to provide within Constitutional limitations, for fair housing throughout the United States." 42 U.S.C. 3601. Title VI requires governmental departments affirmatively to eliminate discrimination and to achieve equal opportunities in federal programs. 42 U.S.C. 2000d, 2000d-1.

A major goal of these provisions is to eliminate patterns of residential segregation and the confinement of minority citizens to ghetto areas. (See Point II, infra.) Congress clearly sought to reverse the past history of federal grant programs. That history was one of grants which reinforced existing patterns of racial segregation. In failing to adhere to that law, the appellee agencies have continued to reinforce those patterns. They have neglected to administer the civil rights requirements of the community development assistance programs to promote an increased supply of integrated housing and, thereby, to begin to redress the plague of racial residential segregation that has beset Westchester County.

Appellants are Black citizens suffering from a lack of fair housing opportunity in the County in which they reside. They are residents of the minority communities of Westchester. But for the total failure of civil rights enforcement so clearly evidenced by the administrative record in this action, there would have been a significant federal impetus for creation of fair housing opportunities and elimination of racial residential segregation in the County. This impetus was what Congress sought by enacting the affirmative duty requirements of the Fair Housing Law and Title VI.

It is the total absence of meaningful civil rights enforcement in the two community development grants to New Castle that caused substantial injuries to appellants individually and to the class they seek to represent. They are precisely the minority citizens who suffer from racial concentration and inadequate housing opportunity in Westchester County -- a condition that affects "the very quality of their daily lives." Shannon v. HUD, 436 F.2d 809, 818 (3d Cir. 1970).

There are two essential and related components supporting appellants' argument that their standing to contest these agency inactions should be readily accorded them by this Court. First, appellants note that the broadest possible standing is available to individuals

who challenge federal administrative actions under the Administrative Procedure Act, 5 U.S.C. §702, and under other federal statutes authorizing review of agency action by "aggrieved parties."* This is particularly true in cases where the individuals suing are representative of a large class of individuals and raise questions involving the public interest. In such cases, the courts have recognized that an attenuated injury suffered in common with many others may still be sufficient to establish standing to sue. Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971); United States v. SCRAP, 412 U.S. 669 (1973); Associations of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150 (1970); Abbott Laboratories v. Gardner, 387 U.S. 136 (1970); Adams v. Richardson, 480 F.2d 1159 (D.C. Cir., en banc, 1973).

Secondly, the courts have been particularly sensitive to the requirement of a liberalized test for standing under the Federal Fair Housing Act in order to implement the critical congressional goals of equal housing opportunity and the elimination of racial residential segregation. The courts have looked in particular at the

* The Fair Housing Law provides a right of action in federal court for a "person aggrieved" which is specifically defined as "any person who claims to have been injured by a discriminatory housing practice" or who believes he will be so injured. (Emphasis added.) 42 U.S.C. 3610a, d.

unique legislative history and language of Title VIII and concluded that Congress intended to provide for comprehensive enforcement of the Act. Trafficante v. Metropolitan Life Insurance Co., 409 U.S. 205 (1972); Shannon v. HUD, supra. Indeed the Court in Trafficante declared that the Civil Rights Acts evince a congressional intention to define standing as broadly as is permitted by Article III of the Constitution. 409 U.S. at 209. The courts are to afford civil rights statutes a "sweep as broad as [their] language." Griffin v. Breckinridge, 403 U.S. 88, 97 (1971).

It is these factors which distinguish the instant case from the Richardson, Reservists, O'Shea line of cases cited by Judge Moore and from the Supreme Court's recent decision in Warth v. Seldin, 45 L. Ed. 2d 343 (1975), affirming 495 F.2d 1187 (2d Cir. 1974), pressed by the appellees in their petitions for rehearing. We deal here with agency noncompliance with a clear statutory duty designed to benefit the specific class of which the appellants are part. The authorities relied upon in the dissent and by the appellees involve constitutional challenges to federal and local actions in the absence of any claim to a statutorily protected right or a right to proceed under the Administrative Procedure Act.

Of critical importance is the Supreme Court's repeated statement that, "Congress may enact statutes creating legal rights,

the invasion of which creates standing, even though no injury would exist without the statute." (Emphasis added.) Trafficante, supra, at 212 (White, J. concurring); Linda R.S. v. Richard D., 410 U.S. 714 at 617, n.3 (1973). This principle was reaffirmed in Warth itself. 45 L.Ed.2d at 363.

Thus, the Supreme Court has consistently granted standing to review federal administrative actions under the Administrative Procedure Act and other federal statutes which confer the right of judicial review on persons "aggrieved" by administrative decisions. Association of Data Processing, Inc. v. Camp, supra; Barlow v. Collins, 397 U.S. 159 (1970); Hardin v. Kentucky Utilities, 390 U.S. 1 (1968); United States v. SCRAP, supra.

In large part, the liberalized definition of standing which the Supreme Court has brought to its analysis of the concept of persons "aggrieved" by agency action reflects the Court's deference to a congressional intent to authorize broad judicial review of administrative decisions. The Supreme Court emphasized this point in Data Processing, supra, writing:

> Where statutes are concerned, the trend is toward enlargement of the class of people who may protest administrative action. The whole drive for enlarging the category of aggrieved "persons" is symptomatic of that trend.

397 U.S. at 154

To this end, the Court in Data Processing outlined the two-pronged test for evaluating standing to sue. The requirements, as noted by Judge Oakes, are that plaintiffs allege an "injury in fact" and seek to protect an interest "arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question" (emphasis added). Id. at 152-153.

The courts have also construed the "injury in fact" requirement very broadly in order to allow judicial enforcement of statutes intended to promote the public interest and which have a wide focus, e.g., laws relating to environmental protection or civil rights. SCRAP, supra; Trafficante, supra; Scenic Hudson Preservation Conference v. Federal Power Commission, 354 F.2d 608 (1965); Shannon v. HUD, supra. In this context, the liberalized view of "injury in fact" has been explained by the importance of allowing litigants who function as "private attorney generals" to come forward and enforce statutes which further broad public policies.*

* In Trafficante, supra, 409 U.S. at 211, the Supreme Court examined the legislative history of Title VIII and concluded that:

> Since HUD has no enforcement powers and since the enormity of the task of assuring fair housing makes the role of the Attorney General in the matter minimal, the main generating force must be private suits in which the Solicitor General says, the complainants act not only on their own behalf but also "as private attorney generals in vindicating a policy that Congress considered to be of highest priority." The role of "private

The SCRAP decision, as noted by Judges Oakes and Gurfein, is particularly instructive in terms of insuring a liberal reading of the term "aggrieved." In SCRAP the plaintiffs asserted that the Interstate Commerce Commission had violated the requirements of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4332(2)(c) in allowing a rate increase for railroad freight. The plaintiffs had alleged that the rate increase would serve as an economic disincentive for private industry to recycle products such as scrap metals. Thus, the ICC action could adversely affect the environment and particularly the environment in recreational areas the plaintiffs used. The Court held the plaintiffs were protected by NEPA and were aggrieved persons within the scope of the Administrative Procedure Act.

In Trafficante, the Supreme Court held that white tenants had standing under the Fair Housing Act, 42 U.S.C. 3610(a) to

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attorney general" is not uncommon in modern legislative programs. See Newman v. Piggie Park Enterprises, 390 U.S. 400, 402; Allen v. State Board, 393 U.S. 554, 556; Perkins v. Matthews, 400 U.S. 379, 396; J. I. Case Co. v. Borak, 377 U.S. 426, 432.

challenge racially discriminatory rental practices. 409 U.S. at 211. The specific injury alleged by the plaintiffs was "the loss of important benefits from interracial association." 409 U.S. at 210. Certainly, this injury is even more general and less tangible than the devastating impact of life in America's urban ghettos asserted by the appellants.

Furthermore, in Adams v. Richardson, supra, 480 F.2d 1159, the Circuit Court for the District of Columbia in an en banc, per curiam opinion sustained a district court injunction ordering the Department of Health, Education and Welfare (HEW) to commence compliance and enforcement proceedings under Title VI of the 1964 Civil Rights Act against ten state-operated systems of higher education; seventy-four secondary and primary school districts found to have reneged on previously approved desegregation plans; and against forty-two other districts found by HEW in presumptive violation of the dictates of Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971). Plaintiffs in Adams were "certain black students, citizens, and taxpayers" (480 F.2d at 1161). Neither the district court nor the Court of Appeals, sitting en banc was troubled by the fact that the plaintiffs were not "potential" users or residents of the several hundred school districts involved.

The Court in Adams implicitly recognized the source of plaintiffs' standing when it accepted plaintiffs' contention that HEW had "consciously and expressly adopted a general policy [of non-enforcement] which [was] in effect an abdication of its statutory duty" (emphasis added). 480 F.2d at 1162.

The foregoing cases clearly demonstrate that Black and Spanish-speaking citizens of an area infected with "the complex problem of system-wide racial imbalance" (Adams, supra, at 1164 n.10) have a "personal stake" in the enforcement of Title VI and Title VIII in the administration of federal assistance programs.

Judge Moore's reliance on Richardson, Schlesinger and O'Shea is simply misplaced. These cases do not deal with enforcement of a statutory right and clearly do not overrule SCRAP or Trafficante. Justice Powell's throughtful concurrence in Richardson, 418 U.S. at 690, is significant in this regard. Justice Powell went to great lengths to clarify why the majority felt it necessary to narrow the line of permissible actions in federal courts involving social conflicts. Nonetheless, Justice Powell made it quite clear that it was incumbent upon the judiciary to defer to Congress when it acts to provide a statutory grant of review.

> The doctrine of standing has always reflected prudential as well as constitutional limitations....

> Whatever may have been the Court's initial perception of the intent of the Framers ... it is now settled that such rules of self-restraint are not required by Art. III but are "judicially created overlays that Congress may strip away...." ... But where Congress does so, my objections to public actions are ameliorated by the congressional mandate. Specific statutory grants of standing in such cases alleviate the conditions that make "judicial forbearance the part of wisdom."
> (Emphasis added)
> 418 U.S. at 196, n. 18

Justice White took a similar approach in his concurrence in Trafficante, 409 U.S. at 212.*

> Absent the Civil Rights Act of 1968, I would have great difficulty in concluding that petitioners complaint in this case presented a case or controversy within the jurisdiction of the District Court under Art. III of the Constitution. But with that statute purporting to give all those who are authorized to complain the right also to sue in court, I would sustain the statute insofar as it extends standing to those in the position of the petitioners in this case.

See also, Katzenbach v. Morgan, 384 U.S. 641, 648-649 (1966); Oregon v. Mitchell, 400 U.S. 112 (1970).**

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* Joined in by Justices Blackmun and Powell.

** In a similar vein the Supreme Court has long instructed that a federal court, sitting as a court of equity, in cases involving enforcement of statutes, has the power and responsibility to fashion to the extent possible remedies necessary to effectuate congressional purposes. See, Porter v. Warner Co., 328 U.S. 395 (1946); Mitchell v.

Nor does Warth (also authored by Justice Powell) detract from the foregoing analysis of appellants' standing. In Warth, the Court was neither presented with the question of who is an "aggrieved" party under the Administrative Procedure Act nor with the question of who has standing to seek judicial review of the failure of federal agencies to implement Congressional civil rights policies.

Warth involved a direct challenge to the zoning ordinance of a suburban community on the grounds that the ordinance violated rights to due process and equal protection of the laws under the Fourteenth Amendment. The plaintiffs included several organizations and some low-income minority residents of the nearby City of Rochester.

The appellees err in relying on Warth, as Judge Oakes noted, in that Warth deals with the question of whether injury in fact results solely from exclusionary municipal land-use policies. In this regard,

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DeMario Jewelry, Inc., 361 U.S. 288 (1960); Edelman v. Jordan, 415 U.S. 651, 672, n.15 (1974); Tunstall v. Brotherhood of Locomotive Firemen and Enginemen, 323 U.S. 210 (1944); J. I. Case Co. v. Borak, 377 U.S. 426 (1964); Deitrick v. Greaney, 309 U.S. 190 (1940).

appellants concededly have little immediate connection with New Castle.* "But the gist of appellants' complaint is the failure of HUD or BOR to implement Title VIII, the Fair Housing Law, an Act which was intended to change the functions of federal grant programs the history of which ... reinforced existing, if not created new, patterns of racial segregation." Slip Op. 3897. Indeed, Justice Powell noted in Warth that the plaintiffs "did not assert on behalf of its members any right of action under the 1968 Civil Rights Act, nor can the complaint fairly be read to make out any such claim." 45 L. Ed. 2d at 363.

This statutory-constitutional distinction also was recently noted by Judge Zampano in Accion Hispana, Inc. v. Town of New Canaan, Civ. No. B-312 (D.C. Conn., Aug. 18, 1975). The New Canaan case is factually similar to Warth in that the plaintiffs, low-income minority citizens, challenged the zoning pattern in the town of New Canaan as discriminatory and exclusionary. The court, in ruling on New Canaan's motion to dismiss for lack of standing, distinguished

* The appellees repeatedly cite throughout this litigation to a stipulation (84a-86a) requested by the appellees and entered into to avoid the need for the taking of numerous depositions of the appellants. The appellants agreed that they had not sought housing in New Castle. See, e.g., New Castle's Petition for Rehearing and Suggestion for Rehearing En Banc, p. 9.

between the plaintiffs' constitutional objections (and claims under 42 U.S.C. 1981, 1982 and 1983), which it dismissed in light of the Warth holding, and the Title VIII claims, over which it maintained jurisdiction.

> The conclusion follows that the violation alleged in the case at bar of these plaintiffs' right under the 1968 Civil Rights Act to be free from racial discrimination in obtaining a dwelling in and of itself creates an "injury in fact," sufficient to confer standing to those within the statutory zones of interests.
>
> The plaintiffs' allegations of racial discrimination violative of 42 U.S.C. Section 3604 also serve to distinguish this case from Warth, where the plaintiffs were found to lack standing. There, as the Court made clear, no violation of the 1968 Civil Rights Act was alleged in the complaint, nor could the complaint be fairly read to make out such a claim. 43 U.S.L.W. at 4913. Indeed, in recognition of the critical impact that such allegations would have upon plaintiffs' standing, the Court arrived at its conclusion only after a most careful scrutiny of the complaint together with supporting briefs. Id. at 4913 n. 21. Here, on the other hand, such allegations of discrimination appear on the face of the complaint.
>
> Slip Op. 7-8

The liberal standard for standing to sue under the Fair Housing Act is consistent with the Supreme Court's instruction that civil rights laws are to be given an expansive reading in order to assist Congress in fulfilling its goal of eliminating segregation and discrimination.

See, Griggs v. Duke Power Co., 401 U.S. 424 (1971); Albemarle Paper Co. v. Moody, 45 L.Ed.2d 280 (1975); Trafficante v. Metropolitan Life Ins. Co., supra. Accord, Williams v. Matthews Co., 499 F.2d 819 (8th Cir. 1974); United States v. City of Black Jack, Mo., 508 F.2d 1179 (8th Cir. 1974); Otero v. New York City Housing Authority, 484 F.2d 1122 (2d Cir. 1973). Also compare the Supreme Court decision in Geduldig v. Aiello, 417 U.S. 484 (1974), which holds that the exclusion of pregnancy-related disabilities from coverage under state-regulated employee disability insurance plans does not violate the Fourteenth Amendment, with this Court's decision in Communications Workers of America v. AT&T Co., 513 F.2d 1024 (2d Cir. 1975), holding that such an exclusion from a private company's employees medical insurance plan could violate the non-discrimination provisions of Title VII of the Civil Rights Act of 1964, the Equal Employment Opportunities Law, 42 U.S.C. 2000e.

Clearly, the congressional purpose in enacting Title VIII is the key element of the nexus between appellants' injury and the administrative conduct challenged by appellants. The District Court, while conceding that appellants' "ghetto living conditions are a very real and very serious 'injury,'" failed to perceive the connection between that injury and the complete failure of federal civil rights enforcement with respect to the New Castle community development

grants. Yet Congress has determined that there is indeed a connection between forced ghettoization and federal community development policy. The appellants maintain that it is not for the judiciary to question the wisdom or effectiveness of the statutory remedy. It is for the judiciary to insure that a duly enacted civil rights law is enforced.

II

APPELLANTS ARE WITHIN THE ZONE OF INTERESTS PROTECTED BY THE FAIR HOUSING ACT AND THE CIVIL RIGHTS ACT OF 1964

The interests appellants assert unquestionably fall within the zone of interests to be protected by affirmative action requirements of Titles VIII and VI. In particular, the language of the Fair Housing Act, its purposes and legislative history, and its interpretation by HUD, the agency principally charged with its administration and enforcement, make this conclusion inevitable.

1. The Legislative Background

As previously noted, Congress broadly set forth the purpose of Title VIII as the promoting of fair housing throughout the United States. 42 U.S.C. 3601. In addition, Congress directed HUD and other federal agencies affirmatively to accomplish that goal.

42 U.S.C. 3608. It is clear that through this legislative scheme, Congress sought to alleviate existing patterns of residential segregation.

The legislative history of Title VIII cited by Judge Oakes indicates a congressional intent to correct the federal government's own sordid involvement in supporting segregation in housing and an intent to break down ghetto walls. Slip Op. 3894-3895 (quoting Senator Mondale and Representative Celler). It is also clear that Congress, in enacting the 1964 and 1968 civil rights laws (and in enacting the Housing and Community Development Act of 1974, see discussion, pp. 40 - 43 , infra), was responding to a wealth of data and numerous calls for action by governmental commissions and agencies.

For example, the 1968 report of the National Advisory Commission on Civil Disorders attested to the significance of utilizing federal programs to reverse the trend of racial segregation:

> Federal housing programs must be given a new thrust aimed at overcoming the prevailing patterns of racial segregation. If this is not done, those programs will continue to concentrate the most impoverished and dependent segments of the population into the central-city ghettos where there is already a critical gap between the needs of the population and the public resources to deal with them.
>
> Report of The National Advisory Commission on Civil Disorders (1968), p. 13.

Similarly, the President's Committee on Urban Housing (Kaiser Commission) in 1968 stated:

> Past housing programs have allowed very little choice on the part of recipients, except the choice of continuing to live in deteriorating slum housing. Public housing, for example, has offered only rental units, usually located within or on the fringes of city slums. Artificial restrictions which restrict the location of subsidized housing should be eliminated so that recipients of assistance would have the widest possible choice of where to live. Removal of restrictions will allow people to locate near places of employment.
>
> President's Committee on Urban Housing, A Decent Home (1968), pp. 47-48

In 1974 the United States Commission on Civil Rights in evaluating equal opportunities in our nation's suburbs found that, "the exclusion of minorities from suburbs diminishes their housing alternatives and often forces minorities to live in substandard inner city housing." U.S. Commission on Civil Rights, Equal Opportunity in Suburbia (1974), p. 67. The Commission then went on to recommend that, "Congress should enact legislation aimed at facilitating free housing choice throughout metropolitan areas for people of all income levels on a nondiscriminatory basis..." and called for "the adoption of a national public policy designed to promote racial integration of neighborhoods throughout the United States." Id. at 69-70.

With respect to past federal support of discriminatory housing practices, the Commission on Civil Rights also stated, "Since the 1930's the Federal Government has supported a variety of programs to increase the supply of housing and to facilitate urban development or redevelopment. Through these activities, the Federal Government has played a primary role in contributing to our segregated housing patterns." Id. at 36.

Former President Nixon in a major statement in 1971 on equal housing opportunity also confirmed the government's responsibility for past support of racial segregation.

> Historically, then the Federal Government was not blameless in contributing to housing shortages and to the impairment of equal housing opportunity for minority Americans. Much has been done to remedy past shortcomings of Federal policy, and active opposition to discrimination is now solidly established in Federal law. But despite the efforts and emphasis in recent years, widespread patterns of residential separation by race and of unequal housing opportunity persist.
>
> Statement of Richard M. Nixon, June 11, 1971. Quoted in Hearing Before the United States Commission on Civil Rights, Washington, D.C. (1971) at pp. 574-75.

2. The Courts

The courts have responded to these congressional goals by holding federal agencies and particularly HUD, to a high standard of compliance with the affirmative action requirement of Title VIII.

It has also been held that failures to meet that obligation are judicially reviewable. Shannon v. HUD, supra; Garrett v. City of Hamtramck, 503 F.2d 1236 (6th Cir. 1974), affirming, 335 F. Supp. 16 (E.D. Mich. 1971); Brookhaven Housing Coalition v. Kunzig, 341 F. Supp. 1026 (E.D.N.Y. 1972); see also, Otero v. New York City Housing Authority, supra.

The Third Circuit in Shannon, described the evolution of this high standard of civil rights compliance, writing:

> Read together, the Housing Act of 1949 and the Civil Rights Act of 1964 and 1968 show a progression in the thinking of Congress as to what factors significantly contributed to urban blight and what steps must be taken to reverse the trend or to prevent the recurrence of such blight. In 1949 the Secretary [of HUD] in examining whether a plan presented by a LPA [Local Planning Agency] included a workable program for community improvement, could not act unconstitutionally, but possibly could act neutrally on the issue of racial segregation. By 1964, he was directed, when considering whether a program of community development was workable, to look at the effects of local planning action and to prevent discrimination in housing resulting from such action. In 1968 he was directed to act affirmatively to achieve fair housing. Whatever were the most significant features of a workable program for community improvement in 1949, by 1964 such a program had to be nondiscriminatory in its effects, and by 1968 the Secretary had to affirmatively promote fair housing.

436 F.2d at 816

The Shannon court ordered that federal financial assistance for an already constructed but as yet not federally subsidized, multi-family project be enjoined until HUD had taken the "necessary procedural and substantive steps" to insure that the project would be part of a program of community development that aimed at eliminating racially segregated neighborhoods in Philadelphia.

3. Hud's Interpretation of Title VIII

As the Agency primarily involved in administering Title VIII, HUD has formally stated in the Historical Overview - Equal Opportunity in Housing, prepared by it in October 1972, that the affirmative action requirement of Title VIII specifically applies to community development programs like those proposed for New Castle:

> A substantial number of programs are subject to these affirmative provisions including those relating to urban renewal, model cities, grants for sewer and water installation, roads, schools and other public facilities relating to urban development.
>
> P-H Equal Opportunity Housing Reporter, Par. 2301, at 2316. (Emphasis added.)

This HUD policy was recognized by appellee S. William Green, HUD Regional Administrator, who testified that Title VIII applied to the sewer grant to New Castle. Green stated that the type of housing development which will occur in a community is intimately related to other aspects of community development such as the construction of

a sewer system, because "as a practical matter, intense development requires sewer lines and sewage treatment plants" (131a). Thus, HUD has recognized its obligation to perform Title VIII review in its sewer program and other community development programs, even though it did nothing to meet this obligation.*

4. The Housing and Community Development Act of 1974

In 1974 Congress totally revamped the federal community development grant programs. Pursuant to the Housing and Community Development Act of 1974, Pub. Act. 93-383, 42 U.S.C. 5301, et seq, the old categorical grant programs involved in this case were eliminated and merged into a system whereby local governments are allocated block grants for housing and community development purposes.

Although this law post-dates the filing of this lawsuit, the structure of the new Act is significant as it further emphasizes that Congress fully intended to use the federal purse strings to achieve compliance with federal civil rights laws promoting equal housing

* It has been frequently noted that the interpretation of a federal statute by the agency charged with its administration is entitled to substantial weight. Udall v. Tallman, 380 U.S. 1, 16 (1965); Griggs v. Duke Power Co., supra.

opportunites. What was inherent under the rubric of "affirmative action," was made explicit by the 1974 law.

In the 1974 law Congress reaffirmed that community development assistance grants are to be awarded with a view towards resolving the problems attending racial and economic isolation of lower income citizens in deteriorated inner city housing. Congress declared that "the Nation's cities, towns, and smaller urban communities face critical social, economic and environmental problems arising in significant measure from ... the growth of population in metropolitan and other urban areas, and the concentration of persons of lower income in central cities...." (emphasis added). 42 U.S.C. 5301(a). Congress went on to indicate that its primary objective in enacting the 1974 law was "the development of viable urban communities, by providing decent housing and a suitable living environment and expanding economic opportunities, principally for persons of low and moderate income." 42 U.S.C. 5301(c). A major objective was "the reduction of the isolation of income groups within communities and geographical areas and the promotion of an increase in the diversity and vitality of neighborhoods through the spatial deconcentration of housing opportunities for persons of lower income and the revitalization of deteriorating or deteriorated neighborhoods to attract persons of higher income." 42 U.S.C. 5301(c)(6).

To accomplish these purposes, Congress placed special emphasis on metropolitan-wide planning and equitable housing development on a regional basis. Congress barred HUD from approving any application for community development funds under the 1974 Act unless the applicant submitted an application setting forth "a three-year community development plan which identifies community development needs, demonstrates a comprehensive strategy for meeting those needs, and specifies both short and long-term community development objectives which have been developed in accordance with areawide development planning and national urban growth policies" (emphasis added). 42 U.S.C. 5304 (a)(1).

Furthermore, applicant communities must file with HUD a housing assistance plan which is to include a survey of the condition of the community's housing stock, establish the number of needed units for persons expected to reside in the community, and indicate the general locations of housing units for lower income persons. With respect to housing lower income persons, the plan must be drawn with the objective of "promoting greater choice of housing opportunities and avoiding undue concentrations of assisted persons in areas containing a high proportion of low-income persons..." 42 U.S.C. 5304(a)(4)(C). Thus, the granting of community development funds is tied to the submission of an acceptable plan which takes into consideration the housing needs

of lower income people throughout a metropolitan area.

The affirmative action concept also winds its way into the 1974 law. HUD's implementing regulations for awarding community development grants under the new law calls for "affirmative action" on the part of recipients "to overcome the effects of conditions which would otherwise result in limiting participation by persons of a particular race, color, national origin or sex." 24 C.F.R. §§570.601(4)(ii).

The Court's decision in this action will be extremely significant in determining whether the laudatory congressional goals of the 1974 Act are ever realized. Vigorous civil rights enforcement ultimately depends upon the willingness of the judiciary to insure that the beneficiaries of this critical legislation are afforded judicial review of alleged agency failure to implement the law.

CONCLUSION

For the foregoing reasons, the appellants submit that the ruling by the panel of this Court rendered on June 2, 1975 was correct. The decision of the District Court should be reversed and this cause remanded for further proceedings on the merits of appellants' claims.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 157—September Term, 1974.

(Argued October 21, 1974 Decided June 2, 1975.)

Docket No. 74-1793

RACHEL EVANS, et al.,

Appellants,

v.

JAMES T. LYNN, et al.,

Appellees,

v.

THE TOWN OF NEW CASTLE,

Appellee-Intervenor.

Before:

MOORE, OAKES and GURFEIN,

Circuit Judges.

Appeal from order of United States District Court for the Southern District of New York, Milton Pollack, *Judge*, dismissing for lack of standing appellants' complaint alleging violation of the 1964 and 1968 Civil Rights Acts, 42 U.S.C. §§ 2000d, 3601. Held, appellants are within the zone of interests protected by the Acts and are sufficiently injured in fact to have standing.

Judgment reversed, cause remanded.

J. Christopher Jensen (Richard F. Bellman, Lois D. Thompson, Suburban Action Institute, Yonkers, N.Y., of counsel), *for Appellants.*

V. Pamela Davis, Assistant United States Attorney (Paul J. Curran, United States Attorney for the Southern District of New York, Steven J. Glassman, Assistant United States Attorney, of counsel), *for Federal Appellees.*

Arthur M. Handler (Andrea Hyde, Golenbock & Barell, New York, N.Y., of counsel), *for Appellee Town of New Castle.*

Jeremiah J. Spires (Harry A. Gottlieb, Wiker, Gottlieb, Taylor & Howard, New York, N.Y., of counsel), *for Appellees Douglas Carroll, Director of Tri-State Regional Planning Commission, and Tri-State Regional Planning Commission.*

Oakes, *Circuit Judge:*

This appeal involves a legal challenge against policies of federal agencies said to flout the requirements of Title VI of the 1964 Civil Rights Act, 42 U.S.C. § 2000d, and Title VIII (Fair Housing) of the 1968 Civil Rights Act, 42 U.S.C. § 3601. Title VI requires federal agencies affirmatively to effectuate its anti-discrimination policy in programs receiving federal financial assistance, 42 U.S.C. §§ 2000d, 2000d-1.[1] Title VIII requires similar effectua-

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1 42 U.S.C. § 2000d.

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied

tion of its fair housing policies, 42 U.S.C. §§ 3601, 3608(c), (d)(5).[2] The federal agencies are the Department of

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the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

42 U.S.C. § 2000d-1.

Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 2000d of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or order shall become effective unless and until approved by the President. Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made and, shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found, or (2) by any other means authorized by law: *Provided, however*, That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. In the case of any action terminating, or refusing to grant or continue, assistance because of failure to comply with a requirement imposed pursuant to this section, the head of the Federal department or agency shall file with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action. No such action shall become effective until thirty days have elapsed after the filing of such report.

2 42 U.S.C. § 3601.

It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States.

42 U.S.C. § 3608.

(c) All executive departments and agencies shall administer their programs and activities relating to housing and urban development

Housing and Urban Development (HUD) and the Bureau of Outdoor Recreation of the Department of the Interior (BOR), whose respective grants to a municipal sewer district within the Town of New Castle, Westchester County, New York, for construction of a sanitary sewer, and to the Town itself for acquisition of "Turner Swamp" for recreational purposes[3] are challenged here as being made to a town that allegedly maintains a racially and economically discriminatory housing and community development program. Suit has also been brought against the regional planning agency, Tri-State Regional Planning Commission (Tri-State), which is the designated clearinghouse which reviews and coordinates applications for federal grants-in-aid in certain counties of New York and New Jersey and certain planning regions of Connecticut, 42 U.S.C. § 3334(a)(1), and which declined to review the grants in question on the grounds that they lacked regional significance.

Appellants assert that they are minority residents of Westchester County who reside in racially concentrated areas of the county and are constrained to do so because the failure of the federal agencies to perform their affirmative duties permits the maintenance of a growing pattern of racial residential segregation both in New Castle and elsewhere in the county. Thus, the case is another in the

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in a manner affirmatively to further the purposes of this subchapter and shall cooperate with the Secretary to further such purposes.

(d) The Secretary of Housing and Urban Development shall—

. . .

(5) administer the programs and activities relating to housing and urban development in a manner affirmatively to further the policies of this subchapter.

3 The grant of matching funds for the sewer was made under the Community Facilities and Advance Land Acquisition Act, 42 U.S.C. § 3102, and the grant for the acquisition of Turner Swamp was made pursuant to the Outdoor Recreation Programs Act, 16 U.S.C. § 460(1).

series of cases in this court and others[4] raising one phase or another in the complex of legal, social, economic and moral problems engendered both by the emergence of the suburbs as increasingly important units of the metropolitan area, significant to the achievement of national goals, and by the realization that housing "does not mean shelter alone—it means a collection of services and opportunities based on locations." [5] The court below granted the Town of New Castle leave to intervene but denied appellants standing to sue on the basis that they assert no "injury in fact" since enjoining the grants in question would not alleviate their injury (in the form of "ghetto living conditions"); Judge Pollack added that their status as "potential residents" of New Castle did not change this result. (This ruling applied to the federal defendants and to Tri-State.) We disagree, expressing, however, no opinion on the question whether appellants have stated a claim for relief.

On the question of standing as to the federal agencies there are three facts which have to be assumed, as they were below, in the present posture of the case. First, appellants are low-income minority residents of Westchester County who live in "ghetto" conditions, that is, racially-

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4 *E.g., Citizens' Committee for Faraday Wood* v. *Lindsay*, No. 73-2590 (2d Cir. Dec. 5, 1974), slip op. 585; *Kennedy Park Homes Ass'n* v. *City of Lackawanna*, 436 F.2d 108 (2d Cir. 1970), *cert. denied*, 401 U.S. 1010 (1971). *See generally* A. Downs, Opening Up the Suburbs: An Urban Strategy for America (1973); Branfman, Cohen & Trubek, *Measuring the Invisible Wall: Land Use Controls and the Residential Patterns of the Poor*, 82 Yale L.J. 483 (1973); Shields & Spector, *Opening Up the Suburbs: Notes on a Movement for Social Change*, 2 Yale Rev. L. & Soc. Action 300 (1972). *But see* Glazer, On "Opening Up" the Suburbs, The Public Interest 89 (1974). An interesting text in the field is Haar & Iatridis, Housing the Poor in Suburbia: Public Policy at the Grass Roots (1974) (hereinafter Haar).

5 See Haar, *supra* n.4 at 320.

concentrated low-income neighborhoods.[6] Second, a matter entirely overlooked in Judge Moore's dissent, the Town of New Castle, to or for whose benefit the challenged grants were made, is, in the words of the district court, "predominantly white [98.7 per cent] and a well-to-do enclave," 90 per cent of which is zoned for single-family, residential development on parcels of more than one acre, with a median value of single-family homes in 1970 in excess of $50,000; the Town has, not coincidentally, thwarted the New York State Urban Development Corporation's attempt to construct within its borders a small 100-unit low cost housing facility and thus in the words of the court below "continues to be resistant to attempts to alter its present housing character." [7] Third, the challenged federal

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6 None of the appellants has been refused the sale or rental of housing in New Castle, has any interest in land within the town or has any connection with any plan or proposal to construct housing for them within the town. Appellant Evans concedes that since September, 1973, she has resided in "decent housing" in a public housing development, with "fine" space. (Her complaint alleging residence in substandard housing was filed August 8, 1973.) It is not claimed that the sewer or park projects will be operated discriminatorily.

7 As is recounted in Haar, *supra*, at 360-61, the State Urban Development Commission (UDC) had housing plans for nine of Westchester County's 18 towns, including New Castle.

> By going into 9 of Westchester's 18 towns at once, [the UDC president] hoped to avoid putting any one local government on the spot. Instead he has found himself up against a coalition of private citizens and private officials attacking the agency on the issues of big government, local control, and home rule.
>
> United Towns for Home Rule . . . was formed by several dozen residents from three of the northern Westchester towns three days before the UDC formally announced its plan . . . .
>
> "What we are saying to the UDC," says Stuart Greene of New Castle, the organization's president, "is, We have not been consulted, you do not have our consent. If we want New York City to move into New Castle, we'll tell you."
>
> Governor Rockefeller and Edward J. Logue, president of the State Urban Development Corporation, have apparently decided to defer

agencies, in approving the grants in question, did very little by way of evaluating the Town's development policies or otherwise,[8] to perform any allegedly affirmative duties required of them by Title VI and Title VIII respectively;[9]

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the UDC's building plans in Westchester County for four months to give the nine towns involved a chance to come up with multi-family housing plans of their own. (*The New York Times*, September 26, 1972.)

The chairman of United Towns for Home Rule, the group that has led the opposition to the state Urban Development Corporation's housing plans in Westchester County, announced yesterday that he was resigning because others in the group's leadership wanted to take it off a present course he characterized as 'moderate.'

In an interview last July, Chairman Greene, a Harvard-educated lawyer, had said he feared that race prejudice rather than the philosophy of local home rule might emerge as the dominant theme in the anti-UDC protest. "The minute I lose a vote to a redneck, I quit," he said then.

Asked whether the events he feared had in fact come to pass, he said, "Yes." (*The New York Times*, October 10, 1972.)

The foregoing Times excerpts were quoted in Haar, *supra* n.4 at 360-61.

8 The HUD "rating sheet" for the preliminary application for the sewer grant here does carry some points for, *e.g.*, the "Percent of housing in project area that will be accessible on a nondiscriminatory basis to families and individuals with low and moderate incomes," but there appears to be no evaluation of the overall residential segregation policies of the community. It is a matter of defense on the merits, on which we express no opinion, whether the agencies in fact performed their affirmative duties; for our purposes it is enough if a viable claim of nonperformance is made.

9 The project approvals here came after President Nixon's 8,000 word policy statement concerning equal housing opportunity on June 11, 1971, in the course of which he declared that his administration would "not attempt to impose federally assisted housing upon any community." *See* Haar, *supra* n.4 at 319, 321-22. *Cf.* N.Y. Times, Dec. 21, 1970, at 1, col. 1, regarding Dayton, Ohio:

> The officials [of Dayton], most of whom are Republicans, are worried about how much support they will receive from Washington. They believe the plan fits the philosophy expressed repeatedly by George Romney, Secretary of Housing and Urban Development, but they are disturbed by President Nixon's news conference statement last week that "forced integration of the suburbs is not in the national interests."
>
> The Dayton plan, they say, is voluntary, not forced, but one of the factors that brought its acceptance was the belief that H.U.D.

the approval of each grant in question was based solely on its internal merits (as to which there is no dispute, that is, no claim that either the sewer system or recreation area will be administered discriminatorily).

Assuming these underlying facts, we first face the question whether appellants are arguably within the zone of interests protected by the statutes, that is, whether there is a viable claim that affirmative duties are imposed upon these federal agencies by Titles VI and VIII which would require them to take some action, not taken here, on behalf of county residents such as withholding otherwise proper grants. Absent such an arguable claim of affirmative duties owed to appellants, they are not within any zone of statutory protection. *Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U.S. 150 (1970). Put another way, we must consider whether either of these agencies is alleged to have "consciously and expressly adopted a general policy [of nonenforcement] which [is] in effect an abdication of its statutory duty." *Adams* v. *Richardson*, 480 F.2d 1159, 1162 (D.C. Cir. 1973) (en banc, per curiam) (ordering HEW to take affirmative action to end segregation in ten states' public educational institutions receiving federal funds, at suit of black "students, citizens and taxpayers"). We think such a viable claim is clearly made out under the

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would use Federal grants in a way that would encourage open communities.

"If political pressures build up so that the suburbs can continue to flout low and moderate income housing and still get their money from Washington there is little we can do," said one official.

Further, the development here illustrates what is involved in the housing controversy that has been under way in the national government. Plans by the Department of Housing and Urban Development to make a strong stand for open communities in the administration of Federal grants have been questioned by Attorney General John N. Mitchell and the White House.

express language of the Acts, nn. 1 and 2 *supra,* the legislative history and the case law.

Title VI requires effectuation of § 2000d by agencies "empowered to extend Federal financial assistance to any program or activity, by way of grant . . . ." 42 U.S.C. § 2000d-1. Title VIII requires administration of housing and urban development programs and activities in all agencies "affirmatively to further the purposes" of the Act, as expressed in 42 U.S.C. § 3601, n.2 *supra.*[10] It

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10 Arguably, the fact that the grants are made to a community which is *near* an urban area would not necessarily make them grants relating to "urban development," since in an era of superhighways and jet travel every community is in a real sense near an urban area. Title VIII, 42 U.S.C. § 3608(e), requires only that the agencies "administer their programs and activities *relating to housing and urban development*" emphasis added) affirmatively to further fair housing. Similarly, 42 U.S.C. § 3608(d)(5) specifically requires HUD so to administer its programs and activities "relating to housing and urban development . . . ." Arguably neither the HUD grant here nor the BOR recreation grant is for a program relating to housing or to urban development.

We are aided here, however, by the interpretation of Title VIII by HUD itself, one which is entitled to substantial weight. *Udall* v. *Tallman,* 380 U.S. 1, 16 (1965). HUD has formally stated as recently as October, 1972, that the affirmative action requirements *do* extend to grants for sewer installation such as here involved:

> A substantial number of programs are subject to these affirmative provisions including those relating to urban renewal, model cities, *grants for sewer and water installation,* roads, schools and other public facilities relating to urban development.

U.S. Dep't of Housing and Urban Development, Historical Overview—Equal Opportunity in Housing, *quoted in* P-H Equal Opportunity in Housing ¶ 2301, at 2316 (emphasis added). The HUD regional administrator stated in his deposition that the Water and Sewer Program was subject to Title VIII requirements. This explains the rating or selection system which, as he said, "did give extra points to those communities with open housing policies."

The same might not be said of the BOR grant which was from the Land and Water Conservation Fund, n.3 *supra.* A grant made under that Act would not necessarily be a "housing" or "urban development" grant under Title VIII. But BOR itself considers New Castle an urban area, both as having a population of over 2,500 and as a satellite community. And BOR's Regional Director demonstrated the nexus which appellants urge, in his deposition that "existing housing patterns and

may be that, as the federal appellees suggest, because Title VI is somewhat limited in remedy, it is not so much involved, although this is a question ultimately on the merits; Title VI contains language in its so-called "pinpoint provision" that limits the power of the agency to terminate funding "to the particular program, or part thereof, in which such [discrimination] has been so found." 42 U.S.C. § 2000d-1, n.1 *supra*. *See Gautreaux* v. *Romney*, 457 F.2d 124 (7th Cir. 1972) (HUD could release Model Cities funds to city independent of city housing authority's discriminatory site selection and tenant assignment procedures). *See* 86 Harv. L. Rev. 427 (1972).

But the same limitation or "pinpoint provision" does not apply to Title VIII. The legislative history of Title VIII is indicative of its scope. In introducing the legislation Senator Mondale referred to the

> sordid story of which all Americans should be ashamed developed by this country in the immediate post World War II era, during which the FHA, the VA, and other Federal agencies encouraged, assisted, and made easy the flight of white people from the central cities of white America, leaving behind only the Negroes and others unable to take advantage of these liberalized extensions of credit and credit guarantees.
>
> Traditionally the American Government has been more than neutral on this issue. The record of the U.S. Government in that period is one, at best, of covert collaborator in policies which established the present outrageous and heartbreaking racial living patterns which lie at the core of the tragedy of the Amer-

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desirable housing patterns ought to be a factor in the planning process in assessing [recreation] needs and we attempt to encourage consideration of all community needs and not just to leave ourselves merely concerned with recreation, because it's important to the fabric of this system."

ican city and the alienation of good people from good people because of the utter irrelevancy of color.

114 Cong. Rec. 2278 (1968).

So too Representative Celler said: "The purpose or 'end' of the Federal Fair Housing Act is to remove the walls of discrimination which enclose minority groups in ghettos . . . ." 114 Cong. Rec. 9563 (1968).

The cases relating to duties created by Titles VI and VIII include *Shannon* v. *HUD*, 436 F.2d 809 (3d Cir. 1970); *Brookhaven Housing Coalition* v. *Kunzig*, 341 F. Supp. 1026 (E.D.N.Y. 1972); *Garrett* v. *City of Hamtramck*, 335 F. Supp. 16 (E.D. Mich. 1971). *See also Otero* v. *New York City Housing Authority*, 484 F.2d 1122 (2d Cir. 1973). The Third Circuit held in *Shannon, supra*, that HUD could not approve a change in an urban renewal plan (from "owner occupied" to "rent supplement" dwellings) without considering under the affirmative duty requirements of Titles VI and VIII whether "the need for physical rehabilitation or additional minority housing at the site in question clearly outweighs the disadvantage of increasing or perpetuating racial discrimination." 436 F.2d at 822. So holding the court said that "Increase or maintenance of racial concentration is prima facie likely to lead to urban blight and is thus prima facie at variance with the national housing policy." 436 F.2d at 821. Clearly the federal government, to the extent it is in the business of granting housing and development funds to communities, is in a central position to exert influence upon, or against, concentration of minority groups in limited areas. As put in dictum by Mr. Justice Stewart in *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 417 (1968), Title VIII at least is "a detailed housing law, applicable to a broad range of discriminatory practices and enforceable by a complete

arsenal of federal authority." Here appellants claim no influence was exerted; the housing law remained unenforced.

We must not only be aware of, we must be guided by the teaching of *Trafficante* v. *Metropolitan Life Insurance Co.*, 409 U.S. 205, 211 (1972), a case involving the question whether complaining tenants were within the class of persons expressly entitled to use under § 810(a) of the Civil Rights Act of 1968, 42 U.S.C. §3610(a), that in connection with fair housing litigation "the main generating force must be private suits . . ." and that "the reach of the proposed law was to replace the ghettos 'by truly integrated and balanced living patterns' [quoting Senator Mondale]." So, too, the Court has advised us that "Congress may enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute." *Linda R. S.* v. *Richard D.*, 410 U.S. 614, 617 n.3 (1973), citing *Trafficante* v. *Metropolitan Life Insurance Co.*, 409 U.S. at 212 (White, *J.*, concurring). The limitation on this is that there must be an "indication that invasion of the statutory right had occurred or is likely to occur." *O'Shea* v. *Littleton*, 414 U.S. 488, 494 n.2 (1974). Here the "statutory right" is to have programs and activities "relating to housing and urban development" administered in furtherance of the fair housing policy. That right is invaded by grants for sewer facilities or acquisition of recreation areas in urban communities which are not so administered.

We are satisfied, then, that the first of the two prongs of the test of standing is met; appellants are arguably within the zone of interests protected by Titles VI and VIII. The inaction on the part of the federal agencies here may have created a breach of their affirmative duties under these Acts and these Acts were designed to protect people

such as these appellants who continue to live in ghettoized communities in the New York City metropolitan area. Title VI protects every person in the United States from discrimination in applicable projects, and Title VIII seeks to ensure fair housing throughout the United States. 42 U.S.C. §§ 2000d, 3608, nn. 1 and 2 *supra*.

Have, however, the appellants demonstrated a nexus between their injury (it is postulated in the opinion of the district court that "ghetto living conditions are a very real and very serious 'injury' ") and the claim of omission of federal civil rights enforcement with respect to the New Castle community development grants? That is, is there asserted an "injury in fact" to these appellants? If we were to look, as the appellees and intervenor would have us look, solely toward New Castle's housing and land-use policies, we would have to answer in the negative, if for no other reason than that a recent decision of this court, *Warth* v. *Seldin*, 495 F.2d 1187 (2d Cir.), *cert. granted*, 43 U.S.L.W. 3208 (U.S. Oct. 15, 1974), would require us to do so.[11] In this respect, appellants have no connection whatsoever with New Castle; there is no showing that they would even try to live in New Castle.

But the gist of appellants' complaint is the failure of HUD and BOR to implement Title VIII, the fair housing law, an act which was intended to change the functions of federal grant programs the history of which, as Senator Mondale's quoted remarks suggest, reinforced existing, if not created new, patterns of racial segregation.[12] In this instance appellants allege injury from appellees' allocation

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11 *Warth* held that "potential residents" of a community lacked standing to challenge its exclusionary zoning policies.

12 *See* Haar, *supra* n.4 at 338 (mortgage insurance and aid to highways as examples of "federal funds . . . partly responsible for present residential socio-economic segregation"); U.S. Comm'n on Civil Rights, Equal Opportunity in Suburbia 43 (July 1974).

of funds to New Castle in violation of Titles VI and VIII which contributes to the perpetuation of appellants' living patterns in the New York City metropolitan area.

Here, then, are agencies with an affirmative duty to encourage fair housing. Allocation of grants without assessing their impact on integration not only may maintain the status quo of living patterns, resulting in injury to those who must continue to live in ghettos, but may also increase the disparity between living styles by supporting "white enclaves" while diverting funds which otherwise would have been used to alleviate ghettoization. In *United States* v. *SCRAP*, 412 U.S. 669 (1973), plaintiffs alleged that the Interstate Commerce Commission's failure to suspend increased freight rates would discourage use of recycled products to the detriment of the environment which they enjoyed. Such omission, they claimed, violated the ICC's duties under the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4332(2)(C). The Court found those plaintiffs aggrieved within the meaning of the Administrative Procedure Act (APA), 5 U.S.C. § 702. *Id.* at 685. The Court also held that

> To deny standing to persons who are in fact injured simply because many others are also injured, would mean that the most injurious and widespread Government actions could be questioned by nobody. We cannot accept that conclusion.

Id. at 688. As in *SCRAP* we have plaintiffs injured in fact by administrative inaction. *See Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402 (1971); *Scenic Hudson Preservation Conference* v. *FPC*, 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966). *Cf. Scanwell Laboratories, Inc.* v. *Shaffer*, 424 F.2d 859 (D.C. Cir. 1970). This is sufficient to give plaintiffs standing to challenge administrative violations of statutory duties. This case is

distinguishable from the recent Supreme Court cases so heavily relied upon in Judge Moore's dissent,[13] in which standing was denied to plaintiffs bringing constitutional challenges to statutes since they contain an underlying, if not articulated, minor premise that Congress cannot enact a statute conferring standing to bring a constitutional challenge. *See* Monaghan, *Constitutional Adjudication: The Who and When*, 82 Yale L.J. 1363, 1380-83 (1973). But where Congress has created a duty, Congress can declare that anyone aggrieved can enforce the correlary right. Again, standing is conceptually broader where a statutory duty has been violated than when prosecutorial or judicial discretion is challenged, since there is no statute conferring review of such actions.[14]

So that our decision may be very clearly understood, we hold only that appellants have standing as to the federal agencies to challenge the particular grants in question. We do not do so on the basis that they have a sufficient connection with the community to or for the benefit of which the grants are made. We do so purely and simply because one important method of enforcement of the congressional policy set forth in Title VIII is by the agencies' administration of grants related either to housing or urban development. The grants here involved, made to an urban community, or one that is satellite to a metropolitan

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13 *O'Shea* v. *Littleton*, 414 U.S. 488 (1974); *United States* v. *Richardson*, 42 U.S.L.W. 5076 (U.S. June 25, 1974) (constitutional challenge to act permitting CIA not to disclose all its expenditures). *Cf. Schlesinger* v. *Reservists Committee to Stop the War*, 42 U.S.L.W. 5088 (U.S. June 25, 1974) (no standing to challenge Congressmen's reserve status as violative of the incompatability clause).

14 *O'Shea* v. *Littleton*, 414 U.S. 488 (1974) (no standing to challenge bond-setting, sentencing and jury fee practices as violative of 42 U.S.C. §§ 1981-83, 1985); *Linda R. S.* v. *Richard D.*, 410 U.S. 614 (1973) (no standing to compel prosecution of the father of plaintiff's illegitimate child for nonsupport).

area of which appellants are residents, are so related. *United States* v. *SCRAP, supra; Trafficante* v. *Metropolitan Life Insurance Co., supra; Adams* v. *Richardson, supra.*

My brethren are in accord that the complaint against Tri-State must be dismissed. In stating my dissenting view, I note that while Tri-State is an interstate body, both corporate and politic, serving as a common agency of Connecticut, New Jersey and New York, created by compact,[15] it has been designated as the areawide clearinghouse for review of applications for federal aid to assure conformance with regional comprehensive plans, a designation which occurs under Circular A-95, promulgated by the Office of Management and Budget, *see* 38 Fed. Reg. 228 (1973), to implement the Demonstration Cities and Metropolitan Development Program Act, 42 U.S.C. § 3334, and the Intergovernmental Cooperation Act, 42 U.S.C. § 4231. The latter commands consideration of impact of the proposed program upon housing and human resources development. 42 U.S.C. § 4231(c). The A-95 Circular specifically calls for comment on the "civil rights aspect of the project," ¶ 3(d), and "[t]he extent to which the project contributes to more balanced patterns of settlement and delivery of services to all sectors of the area population, including minority groups." ¶ 5(d).

It is true that all that Tri-State allegedly did here was to say that the proposed grants had no "regional significance." But it seems to me that appellants are precisely those minority persons who are disadvantaged by unbalanced "patterns of settlement and delivery of services."

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15 Conn. Public Acts, 1965, P.A. 41; Laws of N.J., 1965, c.12; Laws of N.Y., 1965, c.413. The Compact was amended in 1972 to expand Tri-State's role to embrace responsibility for comprehensive planning for the compact region, Conn. Public Acts, 1971, P.A. 450; Laws of N.J., 1971, c.161; Laws of N.Y., 1971, c.333.

Judgment reversed and remanded as to James T. Lynn, the Department of Housing and Urban Development and the Bureau of Outdoor Recreation of the Department of the Interior; judgment affirmed as to appellee Tri-State Regional Planning Commission.

MOORE, *Circuit Judge*, dissenting:

Essentially there is presented in this litigation the question of the extent to which, at the behest of the plaintiffs, the judicial branch of our constitutional government can override, or veto the exercise of, discretionary judgments made by the executive and legislative branches in connection with grants of federal funds made pursuant to the Community Facilities and Advance Land Acquisition Act, 42 U.S.C. §3102 (1972) and the Outdoor Recreation Programs Act, 16 U.S.C. §460 l (1963). Obviously an abstract answer cannot be given, as it were, in a vacuum. Hence the facts essential to a resolution of this controversy must be analyzed with great particularity. In short, who are the plaintiffs, what relief do they seek, what is the legal basis for their alleged grievance, who are the defendants, what wrongs have they allegedly committed and finally wherein did the trial court commit error in the judgment appealed from?

THE PLAINTIFFS

Plaintiffs describe themselves as Black residents, respectively, of the Town of Peekskill, the City of Mount Vernon, the City of White Plains and the Town of Ossining, all in Westchester County, who (with the exception of the plaintiff Evans) express a desire to live in the Town of New Castle, also in the same County, but profess inability to

do so because of New Castle's alleged "discriminatory land use pratices." [1]

THE DEFENDANTS

The defendants are James T. Lynn, as Secretary of the Department of Housing and Urban Development (HUD); Joseph D. Monticciolo, Acting Area Director of HUD (New York); S. William Green, Regional Administrator of HUD; HUD; Douglas Carroll, as Director of Tri-State Regional Planning Commission (Tri-State); Tri-State; Rogers C. B. Morton, as Secretary of the Department of the Interior (Interior); James A. Watt, as Director of the Bureau of Outdoor Recreation (BOR) of Interior; and Interior.

THE COMPLAINT

The King-Greeley Sewer District Grant

The complaint, in substance, alleges that New Castle in 1969 determined to install in the Chappaqua section[2] of New Castle a sanitary sewer system. For this purpose it created the King-Greeley sewer district.[3] New Castle thereafter made an application to HUD for federal financing of the project.[4] "HUD was specifically notified that black and Spanish-speaking persons and all other persons of low income would be denied the opportunity to benefit from Federal funding of the King-Greeley sewer project by virtue of the fact that New Castle through its housing and zoning laws prevents the development of low and moderate

1 Plaintiff Brooks, Jr., merely wishes to move to "safe and sanitary housing in the County which he can afford."

2 Hamlet of Chappaqua.

3 King-Greeley was organized under the New York Town Law (McKinney 1965).

4 The application in the name of "King-Greeley Sanitary Sewer District," dated January 9, 1972, was submitted to HUD.

income housing." (Complaint, par. 21.) Nevertheless HUD granted $358,000 for the project.

The emphasis of the complaint is on New Castle's alleged housing, zoning and land use policies. Neither New Castle nor King-Greeley were named as defendants.[5] Plaintiffs seek indirectly to obtain their objective not by a frontal attack on New Castle on the theory of unconstitutional zoning[6] but by an oblique attack on HUD for failing, in making the sewer grant, "to affirmatively promote fair and suitable housing irrespective of race, color, creed, or national origin pursuant to 42 U.S.C. 3608(d)(5)." (Complaint, par. 36, First Cause of Action); and that HUD by the grant did "assist and encourage New Castle in its practice of racial discrimination" and denying to plaintiffs "their right to participate in the receipt of Federal benefits." (Complaint, par. 37, Second Cause of Action.)

Plaintiffs assert that they "are Black citizens suffering from a lack of fair housing opportunity in the County in which they reside—" (Brief, p. 23) and attribute this suf-

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5 Their presence in the case is as subsequent intervenors.

6 King-Greeley has no zoning authority or powers. In *Warth* v. *Seldin*, 495 F.2d 1187 (2d Cir.), *cert. granted*, 43 U.S.L.W. 3208 (1974) (argued Mar. 17, 1975), this court was faced with a direct (not oblique, as here) attack on the zoning ordinances of the town of Penfield, a suburb of Rochester. There builders had been denied the opportunity to construct multi-family housing in Penfield. The plaintiffs claimed that Penfield's zoning ordinances were unconstitutional because they barred low and middle income persons, especially members of racial minority groups, from residing in Penfield. After reviewing *Baker* v. *Carr*, 359 U.S. 186 (1962); *Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U.S. 150 (1970); *Flast* v. *Cohen*, 392 U.S. 83 (1968); *O'Shea* v. *Littleton*, 414 U.S. 488 (1974); *Barlow* v. *Collins*, 397 U.S. 159 (1970); *Trafficante* v. *Metropolitan Life Insurance Co.*, 409 U.S. 205 (1972); and other cases, this court concluded that to grant injunctive relief or to make a declaration that zoning was unconstitutional upon the facts presented would be "too abstract, conjectural and hypothetical to establish an Article III case or controversy" (p. 1193) and affirmed "on the ground that appellants lack standing." (p. 1189).

fering to the agencies vested by Congress with the power to administer and allot the financial grants made available by Congress in alleging that "they [the agencies] have neglected to administer the civil rights requirements of the community development assistance programs to promote an increased supply of integrated housing . . ." (Brief, p. 23) and that "[t]he housing and land-use policies of New Castle are certainly an effective measure of the extent to which HUD and BOR have violated their independent civil rights obligations." (Brief, p. 25.) Plaintiffs would have the judiciary focus by means of this litigation on "the specific and nationwide abdication by HUD and BOR of their statutory civil rights obligations, as reflected by their failure to engage in any meaningful civil rights review of the New Castle applications for federal community development grants." (Brief, p. 25.)

The Turner Swamp Grant

In 1971 New Castle proposed to acquire some 35 acres of land consisting largely of a bog or marsh area. New Castle requested Federal aid for this Open Space and Recreation project. A review was made by the requisite agencies, Tri-State, Westchester's Department of Planning and appropriate sub-regional planning agencies and municipalities. Tri-State classified the project as "one of non-regional significance." After an inspection by an inspector of BOR who reported that the site ("almost entirely marsh and bog") seemed "to provide excellent wildlife habitat and the proposed impoundment should enhance this quality," a grant (approximately one-half of the estimated cost of $115,000) was made by Interior. Tri-State characterized the area as "a highly suitable conservation area for use as a managed wildlife area, where a varied wildlife population already exists and needs only to be encouraged." (Tri-State Appendix 11.)

THE PROCEEDINGS BELOW

On September 13, 1973, the defendants, the Secretaries of HUD and Interior and certain Directors of various divisions thereof moved to dismiss the complaint pursuant to Rules 12(b)(1) and (6), Fed. R.Civ.P. An affidavit of an Assistant United States Attorney pointed to the alleged weakness of the complaint by stating that plaintiffs made no allegation therein that either the Sewer District or the Turner Swamp would be in any way discriminatory or would not serve all residents equally "black, or white, rich or poor."

On October 9, 1973 plaintiffs moved for a preliminary injunction enjoining HUD from disbursing any funds for the King-Greeley sewer district and Interior from disbursing funds for the acquisition of the Turner Swamp.

The trial court, believing that it could not adequately pass upon the issues raised by both motions without a record showing what HUD and BOR had done prior to approving the grants, directed that the administrative files of each Department relating to the grants in question be made available to the plaintiffs and that the federal administration officials involved be produced for depositions.

Accordingly, during November 1973 the depositions of S. William Green, Regional Administrator (HUD); Gerald V. Cruise, Program Manager (HUD); Susan Alem, Resources Development Officer (HUD); Robert E. Mendoza, Metropolitan Development representative (HUD); Bernard C. Fagan, Outdoor Recreation Planner (BOR); and Maurice D. Arnold, Regional Director (BOR) were taken. Various exhibits were introduced.

Prior to decision and by letter dated March 9, 1974, New Castle and King-Greeley sought to intervene. The deposition of the plaintiff Evans was thereafter taken.

On April 5, 1974, many of the key factual issues were resolved by a Stipulation of Facts entered into (by counsel) by the plaintiffs and New Castle (King-Greeley). The substance of the stipulation was that none of the plaintiffs had "looked for housing for himself or his family in the Town of New Castle"; that no plaintiff or the town of his residence had been deprived of the federal funds granted as herein described; that plaintiffs had no information to believe that non-residents of New Castle would be refused admission to the proposed park (Turner Swamp) for any reason including race, creed, color or income; that no claim is made that persons residing in the King-Greeley district will be denied use of the sewer for reasons of race, creed, color or income; and that there is no claim that the Turner Swamp area has been utilized for low or moderate multi-family housing.

Upon this stipulation and lengthy affidavits with exhibits attached, the deposition of the plaintiff Evans, New Castle and King-Greeley, joined the federal defendants' motion to dismiss.

Tri-State had also moved to dismiss pursuant to Rule 12 (b)(1), (2) and (6), an attorney affidavit accompanying the motion, stating that it was "upon grounds of sovereign immunity". Tri-State had been formed pursuant to an Interstate Compact (New York, New Jersey and Connecticut) wherein in Article IV, sec. 3 it is declared that "It [the Commission] shall enjoy the sovereign immunity of the party states and may not be sued in any court or tribunal whatsoever; . . ."

The Opinion Below

As a preamble, in effect, to the opinion, the court noted that the plaintiffs had been "accorded a wide opportunity to make a factual determination of the New Castle ap-

plications and the civil rights enforcement procedures utilized by the federal defendants." Equally the defendants "had an opportunity to elicit the facts concerning the interest of the plaintiffs." The court concluded that the "legal issue of standing raised by the motions, is now cast in sharp relief against this well-developed factual background."

The court then turned to the threshold and, in its opinion, decisive issue, i.e., "whether plaintiffs have standing to bring this suit." Standing was then tested by "the two-pronged test" namely, have the plaintiffs suffered or will they suffer an "injury in fact" and are they "within the zone of interests protected by the relevant statute." The court was also mindful of the necessity that "litigants maintain a personal stake in the outcome of the controversies they present." *DeFunis* v. *Odegaard,* 416 U.S. 324 (1974).

From the proof submitted, the court concluded that "Plaintiffs do not, and apparently cannot, allege that they will suffer any injury from the grants that have been made by the agencies," which grants clearly insure that New Castle must not discriminatorily administer the sewer or swamp projects. (See "Assurance of Compliance" of HUD and BOR). Accordingly, the court denied plaintiffs' motion for an injunction and dismissed the complaint for lack of jurisdiction.

I

Before the motions were finally submitted to the court for decision, they had acquired somewhat of a hybrid character. The original government defendants' motion to dismiss pursuant to Rule 12(b)(1) and (6) Fed.R.Civ.P. was supported by a five-page affidavit setting forth facts. Plaintiffs' motion for a preliminary injunction was based

on two lengthy affidavits. Tri-State's motion was supported by an affidavit and New Castle—King-Greeley's motion by affidavits of 19 pages and 7 pages plus exhibits. The motion to dismiss thus assumed the status of a motion for summary judgment which in decision the court restricted to the issue of standing. However, only by this factual development was the court able to "cast [this issue] in sharp relief." For purposes of appellate review, "standing" may be assumed to be the sole issue to be determined in light of all the facts developed by the trial court in aid of such determination.

II

Prior to embarking upon a discussion of how the Supreme Court has defined, and granted or denied jurisdictional standing, it would be well to capsulate the nature of this action in terms of plaintiffs' objectives. First, the negative. They do not claim that they have been denied housing or land purchase in New Castle because of color. They do not seek to overturn the New Castle's zoning ordinances as unconstitutional. They do not assert that the funds appropriated will deprive any low-cost housing project thereof. They do not claim that there are any discriminatory features in the sewer and swamp grants.

Affirmatively what they seek is to prevent HUD and BOR from using federal funds (1) for aid in constructing a sewer in a small densely populated section of the Town of New Castle where neither housing or zoning are in question because the area is already well built up on quarter and half acre plots[7] which area is badly in need

7 Tri-State Appendix 4. "The area is almost entirely developed with existing residential and business uses . . . the establishment of sewers in the King-Greeley Sewer District area will not alter, or offer the opportunity to alter, the range of densities proposed for residential development, since the area is already substantially developed with

of sewers for reasons of health;[8] and (2) from acquiring a swamp to protect the environmental quality of the area by preserving open spaces for a wildlife sanctuary and for eduactional purposes, the very goal and concern of so much of our current legislation.

Another pertinent inquiry at this stage is: what would be the result of success for plaintiffs in this litigation? Primarily it would be to prevent their fellow-citizens who are as much in need of sewers as they claim to be in need of housing from having sanitary sewers and a wildlife sanctuary or park, thus preserving fast-shrinking open spaces. But a far more dangerous result would be the establishment of a principle that the judgment and discretion exercised by the executive and legislative branches of government can be examined and questioned (or even overturned) by any citizen, aided by the judiciary, to determine whether the decision (such as HUD's and BOR's here) was to their liking. In short, all administrative agencies will have to make their decisions with the knowledge that Big Brother[9] in the guise of a private attorney-general is peering over their respective administrative shoulders.

In sum, plaintiffs, in a suit challenging only a sewer and a park, seek by an oblique coercive proceeding to have this court, in effect, direct HUD to provide more housing throughout the nation. This conclusion is well-illustrated

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single-family homes that are of good quality and have a considerable period of useful life remaining." Letter, December 28, 1971, Commissioner of Westchester County Department of Planning to New Castle Town Engineer. Tri-State Appendix 29.

8 "[T]he extension of sewers into the service area will greatly improve the environmental and public health aspects of this central area of your town . . . [and is an] improvement of the highest priority, and one which should receive every favorable consideration for Federal aid."

9 G. Orwell, 1984, written in 1949 as a fantasy. Now with only nine years remaining to stave off the prophecy, the date is becoming dangerously close.

by their argument that "the lack of federal administrative pressure on New Castle to encourage fair housing opportunity within its borders through local housing and community development policy directly and materially contributes to growing patterns of racial segregation in Westchester County." (Applt's Brief, p. 39).

In fairness to HUD and BOR they are entitled to have set forth what they did before making the grants in question. No claim is made that any project discrimination exists as to the King-Greeley or Turner Swamp projects. Title VI, 42 U.S.C. 2000 d. HUD also attempted to follow the requirements of Title VIII, 42 U.S.C. 3601 et seq., albeit the loss of the original rating sheet required reconstruction and there were differences of opinion within the Department. Furthermore, the sewer project had been approved by the appropriate County and State departments. Likewise, as to the Turner Swamp, Interior through BOR and the State Liaison Officer had rated the project as qualified for a grant.

III

The guiding principles of law applicable to the proper decision here are to be found in the Supreme Court's recent decision in *O'Shea* v. *Littleton*, 414 U.S. 488 (1974). There, as here, an injunction was sought on the basis that the defendants "have engaged in and continue to engage in, a pattern or practice of conduct . . . all of which has deprived and continues to deprive plaintiffs of their constitutional rights. The Supreme Court gave a most explicit statement as to the essentials for "standing" stating:

> "Plaintiffs in the federal courts 'must allege some threatened or actual injury resulting from some putatively illegal action before a federal court may assume jurisdiction.' . . . There must be a 'personal

> stake in the outcome' such as to 'assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional question.' . . . Nor is the principle different where statutory issues are raised. . . . Abstract injury is not enough. It must be alleged that the plaintiff 'has sustained or is immediately in danger of sustaining some direct injury' as the result of some challenged statute or official conduct. . . . The injury or threat of injury must be both 'real and immediate,' not 'conjectural' or 'hypothetical.'" (p. 493-94) (citations omitted)

Within the year the Supreme Court has again reaffirmed its views as to standing in *United States* v. *Richardson*, 418 U.S. 166 and *Schlesinger* v. *Reservists to Stop the War*, 418 U.S. 208 (both decided June 25, 1974). In these recent decisions the Court expressed its opinion as to the effect of its former (although also recent) decisions defining standing. Since these former decisions are heavily relied upon by the majority, an analysis of the June 25, 1974 decisions and some of the preceding decisions should suffice to demonstrate that the majority opinion cannot be reconciled with them.

In *Schlesinger* the Court "recognized the continued vitality" of *Ex parte Lévitt*, 302 U.S. 633 (1937) (p. 220), and reaffirmed that decision, holding that there must be a concrete injury "actual or threatened", namely, "a particular injury caused by the action challenged as unlawful" —in short, a "particular injury" and a "personal stake." This concrete injury "is especially important when the relief sought produces a confrontation with one of the coordinate branches of the Government;" and "the relief sought would, in practical effect, bring about conflict with

two coordinate branches." (p. 222) What the plaintiffs seek to achieve here would indeed "distort the role of the Judiciary in its relationship to the Executive and Legislature and open the Judiciary to an arguable charge of providing 'government by injunction.'" (p. 222). In holding that there was no citizen standing in *Schlesinger*, the Court noted the restrictive nature of *Association of Data Processing Service Organizations* v. *Camp*, 397 U.S. 150 (1970) ("private competitive injury"), and *United States* v. *SCRAP*, 412 U.S. 669 (1973) ("individual enjoyment of certain natural resources impaired").

In *Richardson*, the Court observed that there is a modern tendency to call upon the courts to solve all problems of society but adhered to the "personal stake" requirement, stating:

> "As our society has become more complex, our numbers more vast, our lives more varied, and our resources more strained, citizens increasingly request the intervention of the courts on a greater variety of issues than in any period of our national development. The acceptance of new categories of judicially cognizable injury has not eliminated the basic principle that to invoke judicial power the claimant must have a 'personal stake in the outcome,' . . . in short, something more than 'generalized grievances,' . . ." (p. 179-80) (citations omitted).

The concern of Mr. Justice Powell regarding "the expansion of judicial power" should well be a worry here. In his concurrence he wrote:

> "Relaxation of standing requirements is directly related to the expansion of judicial power. It seems to me inescapable that allowing an unrestricted taxpayer or citizen standing would significantly alter the allo-

> cation of power at the national level, with a shift away from a democratic form of government. I also believe that repeated and head-on confrontations between the life-tenured branch [the judiciary] and the representative branches of government will not, in the long run, be beneficial to either." (p. 188) (footnote omitted).

It would be in the Justice's opinion, as it is in mine, highly inconsistent "if a democracy were to permit general oversight of the elected branches of government by a nonrepresentative, and in large measure, insulated, judicial branch." (p. 188) (footnote omitted). "Unrestricted standing in federal taxpayer or citizen suits would create a remarkably illogical system of judicial supervision of the coordinate branches of the Federal Government." (p. 189).

In the same vein, Mr. Justice Powell commented that "recourse to the federal courts [where the Federal Government has allegedly been unresponsive to recognize needs or serious inequities in our society] has attained an unprecedented popularity in recent decades. Those courts have often acted as a major instrument of social reform." (p. 191). But he observed "how often and how unequivocally the Court [the Supreme Court] has expressed its antipathy to efforts to convert the judiciary into an open forum for the resolution of political or ideological disputes about the performance of government." (citing cases) (p. 192).

In *Sierra Club* v. *Morton*, 405 U.S. 727 (1972), the Sierra Club, whose members are interested in preserving woodlands and wildlife, in contrast to the destruction of forests and the construction of broad concrete highways, sought to enjoin the building of a vast resort and amusement center, including roadways, in the Mineral King

Valley in California. The District Court had granted an injunction but the Court of Appeals reversed stating among other things that "We do not believe such club concern without a showing of more direct interest can constitute standing in the legal sense sufficient to challenge the exercise of responsibilities on behalf of all the citizens by two cabinet level officials of the government acting under Congressional and Constitutional Authority." 433 F.2d 24, 30 (9th Cir. 1970).

The Supreme Court affirmed the Court of Appeals, writing with particular pertinence to the litigation before us, at page 732: "Where, however, Congress has authorized public officials to perform certain functions according to law, and has provided by statute for judicial review of those actions under certain circumstances, the inquiry as to standing must begin with a determination of whether the statute in question authorizes review at the behest of the plaintiff."

Congress in the Civil Rights Act of 1964, 42 U.S.C. §2000 d (Title VI) clearly evidenced its intention to limit the question of discrimination to the *particular* program in issue. *See* 42 U.S.C. §2000 d-1. As previously mentioned, no discrimination is claimed in either program here, and thus Title VI cannot support the standing of these plaintiffs. Nor is the Civil Rights Act of 1968 any more applicable. Congress clearly stated its intent: "It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States. 42 U.S.C. §3601.

The Court in *Sierra Club* continues with the principle that: The "injury in fact" test requires more than an injury to a cognizable interest. "It requires that the party seeking review be himself among the injured." (p. 735). The Court would deny standing to those "individuals who

seek to do no more than vindicate their own value preferences through the judicial process."

The consequences of any other result were pointed out as follows: "And if any group with a bona fide 'special interest' could initiate such litigation, it is difficult to perceive why an individual citizen with the same bona fide special interest would not also be entitled to do so." (p. 739-40).

In *United States* v. *SCRAP, supra*, the Court was dealing "simply with the pleadings in which appellees alleged a specific and perceptible harm that distinguished them from other citizens who had not used the natural resources that were claimed to be affected." (p. 689) (footnote omitted). The Court could not "say on these pleadings" that injury in fact could not be proven.

But in *Laird* v. *Tatum*, 408 U.S. 1 (1972), the respondents' claim "simply stated, is that they disagree with the judgments of the Executive Branch. . . ." (p. 13). On this subject the Court noted that: "Carried to its logical end, this approach would have the federal courts as virtually continuing monitors of the wisdom and soundness of Executive action; . . ." (p. 15). Accordingly the Court reversed a Court of Appeals decision which had reversed the District Court's denial of an injunction and dismissal of the complaint.

IV

The Majority Opinion

Court decisions should be made with an eye to, and with due regard to, the practical consequences thereof. The consequences of the majority's decision are that the residents of the Hamlet of Chappaqua will not have their much-needed sewer or park. And this, by court decree instigated by a group of plaintiffs who have no interest whatsoever

in a King-Greeley sewer or a Turner Swamp park, neither of which projects admittedly has any discriminatory features. The majority states that "Here, then, are agencies with an affirmative duty to encourage fair housing." However, "fair housing" is not an issue in this case (if "case" it be). To say that plaintiffs' right to adequate housing "is invaded by grants for sewer facilities or acquisition of recreation areas in urban communities which are not so administered" is a most illogical *non sequitur*. Equally illogical is it to say that the allocation of funds to New Castle "contributes to the perpetuation of [plaintiffs'] living patterns in the New York metropolitan area." $358,000 and $57,500 would scarcely suffice for a low-cost housing project.

Admitting that plaintiffs do not have "a sufficient connection with the community to or for the benefit of which the grants are made", the majority believes that it can exert court coercion upon HUD and Interior as well as Tri-State "because one important method of enforcement of the congressional policy set forth in Title VIII is by the agencies' administration of grants related either to housing or urban development." They then find that the grants "are so related."

V

Tri-State

Tri-State is not a federal agency. It has made its own independent appraisal of the King-Greeley sewer and Turner Swamp projects as of "non-regional significance." Accordingly, review of the projects was referred to the Westchester County Department of Planning. It scarcely befits the role of the federal judiciary to override and supersede the judgment of Tri-State in evaluating whether a sewer in a minute area of a town and a small wildlife

park are of sufficient area concern as to call for Tri-State action and reaction. I find no error in Judge Pollack's dismissal of the complaint against Tri-State.

VI

In conclusion I cannot reconcile the majority's holding with the Supreme Court's decisions in *Sierra Club, O'Shea, Richardson* and *Schlesinger,* all of which support Judge Pollack's denial of a preliminary injunction and dismissal of the complaint. Accordingly, I dissent and would affirm Judge Pollack's order.

GURFEIN, *Circuit Judge,* concurring and dissenting:

I concur in Brother Oakes' thoughtful opinion holding that the plaintiffs have standing with respect to defendants HUD and BOR. I must add some words of caution, however, to explain my position. I believe that Judge Pollack's decision was based on a pragmatic view that the case itself, so far as injunctive relief against the grant of federal funds is concerned, may ultimately end in a mere spinning of wheels, for the plaintiffs may not have suffered sufficient "injury in fact" to enjoin the federal grants. While Judge Oakes carefully notes that we are not deciding the merits, I would like to make my own position even clearer.

I would not hold that the plaintiffs necessarily have standing to seek injunctive relief against the Secretary of HUD and his assistants to restrain the grant of federal funds, for that involves the preliminary question of whether a determination by HUD to grant funds to New Castle is subject to judicial review and, if so, at whose instance, a matter we need not decide if we simply reverse the summary judgment. I would hold *only* that the plaintiffs are "adversely affected or aggrieved by agency action within

the meaning of a relevant statute" under the Administrative Procedure Act, Section 5, U.S.C. § 702, to raise the question of whether the Secretary has failed to make the inquiries implied from his affirmative duty "to administer the programs and activities relating to housing and urban development in a manner affirmatively to further the policies of this subchapter" Pub. L. 90-284, Title VIII §808(l)(5), April 11, 1968, 42 U.S.C. § 3608(d)(5), without any consideration of the merits of the lawsuit. See *United States* v. *SCRAP,* 412 U.S. 669 (1973).

In 1968 Congress passed the "Fair Housing" Act prohibiting discrimination in the sale or rental of housing. Civil Rights Act of April 11, 1968, Pub. L. 90-284, Title VIII § 801, 42 U.S.C. § 3601. It contains the general affirmative duty provision noted. 42 U.S.C. § 3608(d)(5).

The Supreme Court has not yet determined whether the affirmative duty goes beyond enforcement of the sale and rental provisions of the Fair Housing Act. Nor has it decided whether, in the absence of hearing and notice provisions like those contained in the Civil Rights Act of 1964, Congress intended that the federal courts should review HUD's policies in relation to grants under the Housing and Urban Development Act of 1965, with the power to issue injunctions against federal assistance to non-pinpointed programs which are not, in themselves, discriminatory.

I think that, in conformity with our national policy to eliminate the disgrace of racial discrimination, the plaintiffs should be heard to test whether HUD has done its duty in the premises. *Data Processing Organization, Inc.* v. *Camp,* 397 U.S. 150 supports the result, as does *SCRAP, supra.*

Although the question is close, minority people fairly near the geographical area involved may be deemed "aggrieved" by agency inaction, at least in the general way

that the environmentalist law students were injured by the inaction of the Interstate Commerce Commission in *United States* v. *SCRAP, supra,* or the class of black students in *Adams* v. *Richardson,* 480 F.2d 1159, 1162 (D.C. Cir. 1973). The failure of the Executive Branch to enforce a statutory duty imposed on it may cause injury in fact to the class affected, even though, as Judge Oakes states, "no injury would exist without the statute." *Linda R.S.* v. *Richard D.,* 410 U.S. 614, 617 n.3 (1973). That does not mean, to be sure, that they can compel judicial review. In that sense, as Judge Oakes recognizes, standing and judicial review are discrete issues.

In cases raising issues of discrimination, as well as environmental considerations, all that conferring standing under the Administrative Procedure Act does is to let an Article III "case or controversy" be heard with the sharp adversity required. See *SCRAP, supra.*

The courts must still determine the extent, if any, of permissible federal coercion by the withholding of federal assistance. Cf. *Adams* v. *Richardson, supra.* That is why it is proper to allow standing to these plaintiffs so that they may raise, in a judicial context, what the obligations of HUD are and whether HUD has met them. We should be liberal in granting standing where the challenge is to alleged administrative failure to act in the face of an alleged statutory duty, particularly in a civil rights case. As Judge Oakes notes, that is the meaning of *United States* v. *SCRAP, supra.* Cf. *Shannon* v. *HUD,* 436 F.2d 809 (3 Cir. 1970). In my view, a person may be an "aggrieved person" within the meaning of the Administrative Procedure Act, 5 U.S.C. § 702, to remedy administrative inaction without necessarily having standing for other relief. He may be aggrieved by HUD's failure to perform its statutory duty of inquiry, which is for his class benefit. He may not

have been injured in fact sufficiently to coerce the executive agency to withhold funds.

On the standing to sue Tri-State I respectfully disagree with my brother Oakes. There must be some balancing of interest. To allow every denial of area significance to be reviewed by the courts, particularly at the instance of persons as remote from area considerations as these plaintiffs are, would simply invite a plethora of suits with a grave question of the ultimate judicial competence to solve them. Whether a sewer pipe in a town is a concern of a large area need not be litigated in the context of racial discrimination. It is better to dismiss the complaint against Tri-State now, as Judge Pollack did. In that respect I agree with Judge Moore though for somewhat different reasons.

Lastly, I must disassociate myself from my brother Moore's statement that the issue is "the question of the extent to which, at the behest of the plaintiffs, the judicial branch of our constitutional government can override, or veto the exercise of discretionary judgments made by the executive and legislative branches in connection with grants of federal funds made pursuant to the Community Facilities and Advance Land Acquisition Act, 42 U.S.C. § 3102 (1972) and the Outdoor Recreation Programs Act, 16 U.S.C. § 4601 (1963)." When Congress imposed on the Secretary of HUD the affirmative duty to administer all "programs and activities relating to housing and urban development in a manner affirmatively to further the policies of this subchapter" 42 U.S.C. § 3608(d)(5) it did not mean that HUD could disregard that mandate "in its discretion." In fact, HUD has adopted procedures to determine local racial policies in the case of the New Castle grant.

The case may well be a close case, but it is not out of the mainstream of court review of agency inaction in the face of a statutory duty. When Congress says federal funds shall not be used if certain conditions exist, the courts are often not without jurisdiction to review. The majority opinion does not mean that New Castle shall not have its sewer. If that should be the end result of the judicial process it will be only because Congress, not the courts, determined the national policy against the particular use of federal funds, which the courts were required to respect.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- X

RACHEL EVANS, et al.,

Plaintiffs-Appellants,

-vs.-

JAMES T. LYNN, et al.,

Defendants-Appellees,

TOWN OF NEW CASTLE, NEW YORK,

Intervenor-Appellee.

- X

No. 741793

CERTIFICATE OF SERVICE

This is to certify that two copies of the appellants' brief on rehearing en banc were served this 19th day of September, 1975 via first-class mail, postage prepaid, on counsel for defendants-appellees and intervenor appellee, as follows:

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